
No. 03-3294

**In the United States Court of Appeals
for the Eighth Circuit**

IRENE BARNETT
Plaintiff/Appellant

V.

JO ANNE B. BARNHART, COMMISSIONER,
SOCIAL SECURITY ADMINISTRATION
Defendant/Appellee

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION

BRIEF OF APPELLANT

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SUMMARY OF THE CASE
AND REQUEST FOR ORAL ARGUMENT

This is an appeal by Irene Barnett from an Order of the United States District Court for the Eastern District of Arkansas, affirming the Commissioner's decision which denied Barnett's application for supplemental security income (SSI) (Title XVI). Barnett filed an application for benefits in April 2000. Her claim was denied through all administrative levels. She sought review of the Commissioner's decision in the United States District Court for the Eastern District of Arkansas, arguing that it was not supported by substantial evidence. On August 28, 2003, the district court affirmed the Commissioner's decision. This appeal followed.

The appellant believes that oral argument would be of material assistance to the Court in deciding this case, and thus, respectfully requests that her attorney be given fifteen minutes in which to present oral argument.

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JURISDICTIONAL STATEMENT

(i) This appeal is from an order filed on August 28, 2003, in the United States District Court for the Eastern District of Arkansas, Jonesboro Division, No. No. 3:02CV00216-HLJ, issued by the Honorable Henry L. Jones, United States Magistrate Judge.

(ii) The United States District Court for the Eastern District of Arkansas had proper jurisdiction to review a final decision of the Commissioner of the Social Security Administration pursuant to 42 U.S.C. § 405(g).

(iii) Pursuant to 28 U.S.C. § 1291, this Court has jurisdiction to review the final judgment of the United States District Court entered on August 28, 2003, from which the appellant filed a timely notice of appeal on September 9, 2003.

STATEMENT OF THE ISSUE

Whether the Commissioner's decision that Irene Barnett is not disabled within the meaning of the Social Security Act is supported by substantial evidence on the record as a whole.

McCoy v. Schweiker, 683 F.2d 1138 (8th Cir. 1982)

Delrosa v. Sullivan, 922 F.2d 480 (8th Cir. 1991)

Social Security Ruling 83-14

STATEMENT OF THE CASE

Irene Barnett protectively filed an application for supplemental security income (SSI) on April 26, 2000. (Tr. 74-76). Her claim was denied at the initial and reconsideration levels. (Tr. 59-71). A hearing was held on October 24, 2001, before an Administrative Law Judge (ALJ). (Tr. 37-58). On February 19, 2002, the ALJ issued an unfavorable decision denying Barnett's claim. (AD 1-7; Tr. 8-17). On May 9, 2002, the Appeals Council denied Barnett's request for review. (AD 8-9; Tr. 3-4). Barnett sought judicial review of the Commissioner's denial. On August 28, 2003, the district court affirmed the Commissioner's decision. (AD 10-19). This appeal followed.

STATEMENT OF FACTS

A. Testimonial and documentary evidence.

Irene Barnett was thirty-eight years old at the time of the hearing, has a high school diploma, and has never had a driver's license. She has two small children, and lives off a small grant and food stamps. She has worked as a motel housekeeper, an assembly line stamper, and fast food cashier. (Tr. 41-45).

Barnett is disabled due to severe right wrist and hand problems. She was fired from her last job as a housekeeper because she could not make up the beds as fast as her co-workers. She is also unable to straighten out the 5th finger on her left hand due to a previous injury. (Tr. 44-47). Barnett testified that she cannot bend, extend, or flex her right wrist, and has difficulty manipulating her finger. (Tr. 46). Her right hand and wrist swell, and rainy weather increases the pain up into her right arm. (Tr. 48). She has difficulty writing because she is right handed, and has to use her left hand to brush her teeth and comb her hair. She is unable to fix her daughter's hair and has to have her sister do it. (Tr. 43, 53). Her medications include Naproxen, Hydrocodone, and Norco for pain, and Diclofenac for fluid retention. (Tr. 119). In forms completed for the Social Security Administration (SSA), Barnett indicated that her right wrist and hand hurt most of the time and that movement increases the pain. (Tr. 97).

Barnett testified that Dr. Brandt was in the process of scheduling surgery for her right hand and wrist. He stated that although he could not give Barnett her wrist back, the surgery could help the pain and swelling. She was also working with the

Arkansas Department for Rehabilitation to try to find something she could do. (Tr. 51-53).

Patrick Newbern, Barnett's boyfriend, testified that his girlfriend had begun having difficulty comprehending. He stated that during a conversation she had difficulty concentrating and appeared to be distracted. (Tr. 55). He stated that Barnett always uses her left hand when doing things, and that he can tell that her right hand hurts her because she keeps it folded up against her stomach. (Tr. 56).

B. Medical evidence.

Relevant medical evidence in the record shows that on August 31, 1992, Barnett was treated by James Russell, M.D., for a possible fracture of the carpal and navicular bone in the right wrist. (Tr. 141). On May 4, 2000, Dr. Russell treated Barnett for right wrist pain with a prescription of Vioxx. On May 26, 2000, he treated her for arthritic left wrist pain for which he prescribed Lodine and heat. (Tr. 135).

On November 28, 2000, Barnett was treated by Dr. Russell for a jammed fifth finger on the left hand and left wrist pain. Dr. Russell noted a mallet fifth finger. He splinted the finger and prescribed Lorcet Plus. (Tr. 157).

On March 21, 2001, Barnett was evaluated by Jason Brandt, M.D., an orthopedist, for increasing pain in her right wrist and hand, with marked tingling in her fingertips and an inability to grip or make a fist. Physical examination revealed that the right wrist was swollen and somewhat deformed with marked tenderness and decreased sensation. There was marked atrophy, minimal ability to

oppose her thumb, marked weakness, and a positive Tinel's sign. X-rays revealed a scaphoid/non-malunion, advanced collapse of the capitate, and marked radial styloid changes. Dr. Brandt diagnosed: (1) SLAC wrist/scaphoid non-union with degenerative wrist disease, and (2) CT syndrome on the right. He recommended nerve conduction studies and noted that surgery was likely but at this point would mainly be a salvage procedure. He prescribed Naprosyn, Darvocet, and a wrist immobilizer. (Tr. 144).

On May 21, 2001, Dr. Russell treated Barnett for right arm pain, as well as nausea and vomiting. (Tr. 155).

Barnett began seeing S. Mittal, M.D., on July 11, 2001. She complained of chronic wrist pain from a previous injury. Dr. Mittal diagnosed chronic right wrist pain and prescribed Lortab. (Tr. 154). On August 31, 2001, Dr. Mittal treated Barnett for significant right wrist pain. He diagnosed right wrist arthralgia, prescribed Norco for the pain, and recommended that she return to Dr. Brandt. He noted that Barnett could not afford the wrist splint she was given at her previous appointment. (Tr. 153).

Barnett returned to Dr. Brandt with increased right hand and wrist pain on October 18, 2001. Upon physical examination there was minimal motion of the hand or wrist, and what little motion there was was markedly painful. There was decreased sensation and decreased strength. Tinel's and Phalen's signs were positive. Dr. Brandt made the same diagnoses as before, and recommended that Barnett be evaluated by an orthopedic hand specialist for a possible wrist fusion.

He noted that he would continue to see Barnett on an as needed basis, and would complete disability papers. He also prescribed Lortab for pain. (Tr. 145).

On October 19, 2001, Dr. Mittal treated Barnett for non-ulcer dyspepsia and lumbar strain. He prescribed Phenergan, Pepcid, and Ultram. (Tr. 152).

C. Administrative proceedings.

The administrative law judge (ALJ) evaluated Barnett's claim for benefits according to the familiar five-step analysis prescribed by the Social Security regulations. *See* 20 C.F.R. § 416.920(a)-(f). In a decision dated February 19, 2002, the ALJ made the following findings:

1. Barnett has not engaged in substantial gainful activity since April 26, 2000, the date her application was filed.
2. Medical evidence establishes that Barnett has severe bilateral wrist pain.
3. Barnett does not have an impairment that meets or equals a listed impairment.
4. Barnett's subjective complaints are not fully credible. She has the residual functional capacity for light work. Barnett's limitations do not prevent her from performing her past relevant work as a housekeeper or assembly line worker. Therefore, Barnett is not disabled under the Act. (AD 6-7; Tr. 16-17).

On May 9, 2002, the Appeals Council denied Barnett's request for review. (AD 8-9; Tr. 3-4). Thus the ALJ's decision stands as the final decision of the Commissioner and it is from this decision that Barnett seeks judicial review.

SUMMARY OF THE ARGUMENT

The ALJ wrongly denied benefits to Irene Barnett when he failed to include any manipulative limitations in his assessment of Barnett's residual functional capacity. Barnett is unable to use her right wrist for work-related activities due to a poorly healed wrist fracture, degenerative wrist disease, and carpal tunnel syndrome. The ALJ's omission of any manipulative limitations from his RFC assessment skewed his determination that Barnett can return to her past relevant work as an assembly line worker or housekeeper.

ARGUMENT

THE COMMISSIONER'S DECISION DENYING IRENE BARNETT'S CLAIM FOR SUPPLEMENTAL SECURITY INCOME IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE.

A. Standard of review.

Judicial review of the Commissioner's denial of benefits determines whether the Commissioner has correctly applied the law and whether there is substantial evidence on the record as a whole to support his decision. 42 U.S.C. § 405(g); *Keller v. Shalala*, 26 F.3d 856, 858 (8th Cir. 1994). Substantial evidence is not the same as any evidence; it is less than a preponderance, but enough that a reasonable mind might find adequate to support the Commissioner's conclusion. *Robinson v. Sullivan*, 956 F.2d 836, 838 (8th Cir. 1992). Moreover, "[t]he substantial evidence test employed in reviewing administrative findings is more than a mere search of the record for evidence supporting the [Commissioner's] findings." *Gavin v. Heckler*, 811 F.2d 1195, 1199 (8th Cir. 1987). The reviewing court must look for substantial evidence on the record as a whole, which requires the court to "take into account whatever in the record fairly detracts from its weight." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). Thus, the court must consider the weight of the evidence supporting the Commissioner's decision and how contradictory evidence detracts from that weight. *Gavin*, 811 F.2d at 1199 (noting that *Universal Camera* requires a "searching inquiry" into how any contradictory evidence balances out). See *Robinson*, 956 F.2d at 838 (emphasizing that the court must "do more than merely parse the record for substantial evidence supporting

the [Commissioner's] decision. [It] also must consider evidence in the record that detracts from the weight of the decision.”); *Wilson v. Sullivan*, 886 F.2d 172, 176 (8th Cir. 1989) (reversing the district court's decision because the magistrate failed to take into account the weight of the evidence upon which the ALJ relied and to apply a balancing test to any contradicting evidence).

B. The regulatory framework.

The Commissioner has adopted regulations creating a five-step test to determine whether a claimant is disabled. *See* 20 C.F.R. § 416.920(a)-(f); *Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987) (describing the process). The first two steps involve threshold determinations as to whether the claimant is not presently working and has an impairment which is of the required duration and which significantly limits her ability to work. 20 C.F.R. § 416.920(a)-(c). In the third step, the medical evidence of the claimant's impairments is compared to a list of impairments presumed severe enough to preclude any gainful work. *See* 20 C.F.R. pt. 404, subpt. P, App. 1. If an impairment matches or is equal to one of the listed impairments, the claimant qualifies for benefits without further inquiry. *Id.* § 416.920(d). If the claimant cannot qualify under the listings, the analysis proceeds to the fourth and fifth steps. At these steps, the inquiry is whether the claimant can do her own past work or any other work that exists in the national economy, in view of her age, education, and work experience. *Id.* § 416.920(e)-(f). If a claimant demonstrates that she cannot perform her past work, the burden shifts to the Commissioner to show that there are other jobs in the national economy the

claimant can perform. *Reed v. Sullivan*, 988 F.2d 812, 815 (8th Cir. 1993). If the claimant cannot do her past work or any other work, she qualifies for benefits.

C. The ALJ's determination that Barnett can perform the full range of light work with no manipulative limitations is not supported by substantial evidence on the record as a whole.

Irene Barnett suffers from severe pain and limitation of motion in her right wrist. The ALJ nevertheless determined that Barnett has the residual functional capacity (RFC) for the full range of light work with no manipulative limitations. The ALJ's assessment of Barnett's RFC is not supported by the record.

"Residual functional capacity" (RFC) describes what a claimant can do despite his limitations. 20 C.F.R. § 416.945(a). Social Security Ruling 96-9p states that

RFC is the individual's maximum remaining ability to perform sustained work on a regular and continuing basis; i.e., 8 hours a day, for 5 days a week, or an equivalent work schedule. It is not the least an individual can do, but the most, based on all of the information in the case record.

This Court has emphasized that residual functional capacity "is not the ability merely to lift weights occasionally in a doctor's office; rather, it is the ability to perform the requisite physical acts day in and day out, in the sometimes competitive and stressful conditions in which real people work in the real world." *McCoy v. Schweiker*, 683 F.2d 1138, 1147 (8th Cir. 1982) (en banc). The record shows that Barnett does not possess the RFC to perform the full range of light work on a continuing, "day in and day out" basis.

The medical evidence shows that Barnett suffers from serious problems with her right wrist and hand. The most compelling medical evidence comes from Dr.

Brandt, an orthopedist who has treated Barnett on two occasions upon referral from Barnett's regular physician. On March 21, 2001, Dr. Brandt's physical examination revealed that the right wrist was swollen and somewhat deformed with marked tenderness and decreased sensation. Dr. Brandt also noted marked atrophy, minimal ability to oppose her thumb, marked weakness, and a positive Tinel's sign. X-rays revealed a scaphoid/non-malunion, advanced collapse of the capitate, and marked radial styloid changes. Dr. Brandt diagnosed: (1) SLAC wrist/scaphoid non-union with degenerative wrist disease and (2) carpal tunnel syndrome on the right. He recommended nerve conduction studies and noted that surgery was likely but at this point would mainly be a "salvage procedure." He prescribed Naprosyn, Darvocet, and a wrist immobilizer. (Tr. 144).

Barnett returned to Dr. Brandt with increased right hand and wrist pain on October 18, 2001. Dr. Brandt's physical examination revealed minimal motion of the hand or wrist, and what little motion there was was markedly painful. He also noted decreased sensation and decreased strength in the right extremity. Tinel's and Phalen's signs were positive. Dr. Brandt made the same diagnoses as before, and recommended that Barnett be evaluated by an orthopedic hand specialist for a possible wrist fusion. He noted that he would continue to see Barnett on an as needed basis, and would complete disability papers. He also prescribed Lortab for pain. (Tr. 145).

Despite this uncontradicted evidence, the ALJ found that Barnett can perform the *full range* of light work—he concluded Barnett has *no* limitations in her abilities

to reach, handle, grasp, finger, push, or pull.¹ The ALJ's failure to include any significant manipulative limitations in his RFC assessment is not supported by the medical evidence. Dr. Brandt, an orthopedist, indicated that Barnett needs a wrist fusion, but that any surgery at this point would simply be a "salvage procedure." This is due to the failure of Barnett's right wrist to properly heal after an earlier fracture, degenerative wrist disease, and carpal tunnel syndrome. These conditions, especially in combination, make it difficult for Barnett to engage in manipulative activities with her right hand. Carpal tunnel syndrome, for example, results from compression of the median nerve of the wrist and

produces paresthesias in the radial-palmar aspect of the hand plus pain in the wrist, in the palm, or sometimes proximal to the compression site in the forearm and shoulder. The pain may be more severe at night. Sensory deficit in the palmar aspect of the first 3 digits and/or weakness and atrophy in muscles controlling thumb abduction and apposition may follow. . . . Performing tasks requiring forceful wrist flexion should be discontinued.

The Merck Manual 1519-20 (16th ed. 1990). The ALJ's omission of manipulative limitations from Barnett's RFC is not supported by substantial evidence on the record as a whole.

The ALJ wrongly believed that merely restricting Barnett to light work adequately would account for the effect of Barnett's inability to use her right wrist for work-related activities. While Barnett's wrist impairment certainly affects her ability to lift and carry, it also restricts her ability to use her right hand and arm for

¹ The ALJ specifically concluded that Barnett is able to "push and pull without limitation other than as shown for lifting and carrying." (AD-5; Tr. 15).

reaching, handling, and other manipulative activities. Social Security Ruling 83-14 states that unskilled light work requires “gross use of the hands to grasp, hold, and turn objects.” Soc. Sec. Ruling 83-14, 1983-1991 Soc. Sec. Rep. Ser. 41 (West). Barnett’s poorly healed wrist fracture, degenerative wrist disease, and carpal tunnel syndrome significantly limits her ability to engage in these types of activities.

The ALJ apparently succumbed to the temptation to “play doctor” by ignoring medical evidence in the record and making his own independent medical findings. *See Delrosa v. Sullivan*, 922 F.2d 480, 484 (8th Cir. 1991) (holding that it is improper for an ALJ to substitute his “own unsubstantiated conclusions” regarding claimant’s medical condition for that of physician); *Ness v. Sullivan*, 904 F.2d 432, 435 (8th Cir. 1990) (noting that the ALJ must not substitute his opinions for those of the physician). As the Eighth Circuit said in *Lund v. Weinberger*, 520 F.2d 782, 785 (8th Cir. 1975): “An administrative law judge may not draw upon his own inferences from medical reports. *See Landess v. Weinberger*, 490 F.2d 1187, 1189 (8th Cir. 1974); *Willem v. Richardson*, 490 F.2d 1247, 1248-49 n. 3 (8th Cir. 1974).” The ALJ in the present case ignored the uncontroverted opinion of Dr. Brandt and concluded that Barnett has no significant manipulative limitations due to her wrist impairment.

The ALJ’s failure to properly assess the nature and severity of Barnett’s wrist impairment skewed his determination that Barnett has the RFC to return to her past relevant work as an assembly line worker or housekeeper. Given the fact that Barnett’s poorly healed wrist fracture, degenerative wrist disease, and carpal tunnel

syndrome limits her grasping and manipulative ability in her right hand, the ALJ erred when he concluded that Barnett can return to her past work as an assembly line worker on a continuing basis. Barnett stated that her past work on the assembly line required her to “put parts together” and that this aggravated her “arthritis” (i.e., wrist pain). (Tr. 101). She testified that she cannot use her fingers to manipulate objects, such as fastening a nut and bolt together; when she tries, her hand starts shaking real bad. (Tr. 46). Assembly line work, even at the light level, obviously requires significant manipulative abilities.

The ALJ also erred when he found that Barnett can return to her past work as a housekeeper. According to the ALJ, Barnett “indicated that her job as a housekeeper was performed at the sedentary level.” (AD-5; Tr. 15). But Barnett stated that she was on her feet “all day” and that she “carr[ied] a buggy around [to] 15 or 20 rooms all day fill [sic] with about 35 pounds of product [sic].” (Tr. 102). Barnett testified that she was fired from this job because she was slow and could not make beds as fast as other housekeepers. (Tr. 44). She added that her right hand “was going out on me. I could feel it eventually because I got slower and slower, and it started swelling on me each day.” (Tr. 48).

If Barnett cannot return to her past work as an assembly line worker or housekeeper, the sequential evaluation proceeds to the fifth and final step, at which the burden shifts to the Commissioner to prove that there is other work in the economy that Barnett can perform. At this step, Barnett’s manipulative

limitations will require consideration by a vocational expert. Social Security Ruling 85-15 states in relevant part:

Reaching (extending the hands and arms in any direction) and handling (seizing, holding, grasping, turning or otherwise working primarily with the whole hand or hands) are activities required in almost all jobs. Significant limitations of reaching or handling, therefore, may eliminate a large number of occupations a person could otherwise do. Varying degrees of limitations would have different effects, and the assistance of a [vocational expert] may be needed to determine the effects of the limitations.

Soc. Sec. Ruling 85-15, 1983-1991 Soc. Sec. Rep. Ser. 97-98 (West). The ALJ erred by failing to find that Barnett suffers from significant manipulative limitations and that those limitations preclude performance of her past relevant work. His should be reversed and the case should be remanded with instructions to proceed to step five and to obtain vocational expert testimony regarding what jobs, if any, Barnett is capable of performing.

CONCLUSION

For the reasons set forth above, the Commissioner's decision that Irene Barnett is not disabled is not supported by substantial evidence. The final decision of the Commissioner should be reversed and appropriate benefits awarded or, in the alternative, the case should be remanded for proper evaluation of Barnett's claim.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)(7)
AND EIGHTH CIR. R. 28A(c)

The undersigned hereby certifies that this brief complies with Federal Rule of Appellate Procedure 32(a)(7) regarding type and volume limitations. The word count is 3,566. The word processing software used is Microsoft Word X for the Macintosh. A copy of the brief has been provided to the Court and Appellee's counsel on CD. The brief has been converted to Adobe PDF format. The CDs have been scanned for viruses and are virus free.

E. Gregory Wallace

October 27, 2003

CERTIFICATE OF SERVICE

I, E. Gregory Wallace, do hereby certify that I have served a copy of the above and foregoing document on the defendant by mailing a copy of the same to the Robert Bowman, Office of the General Counsel, Social Security Administration, 1301 Young Street, Suite 430, Dallas, Texas 75202, on this 27th day of October 2003.

E. Gregory Wallace

ADDENDUM

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